THE INDIANA CIVIL RIGHTS COMMISSION
311 West Washington Street
Indianapolis, Indiana 46204

STATE OF INDIANA)
)
COUNTY OF MARION)

DONNA JO ANNE BALLARD,
Complainant,

DOCKET NO. EMse79077067
EEOC NO. 053791721

vs.

KENNECOTT CORPORATION,
Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Comes now Robert D. Lange, Hearing Officer for the Indiana Civil Rights Commission ("ICRC") and enters his Recommended Findings of Fact, Conclusions of Law, and Order (hereinafter "the recommended decision"), which recommended decision is in words and figures as follows:

(H.I.)

And comes not any party filing objections to said recommended decision within the ten (10) day period prescribed by IC 4-22-1-12 and 910 IAC 1-12-1(B).

And comes now ICRC, having considered the above and being duly advised in the premises and adopts as its final Findings of Fact, Conclusions of Law, and Order recommended by the Hearing Officer in the recommended decision, a copy of which is attached hereto and incorporated by reference herein.

Dated: February 12, 1982

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RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On October 21, 1981, Respondent Kennecott Corporation ("Kennecott"), by counsel, filed its Motion of Kinnecott Corporation to Vacate Finding of Probable Cause or, in the alternative, for Summary Judgment. After a Reply filed by Complainant Donna Jo Ann Ballard ("Ballard"), by counsel, to which Kinnecott, by counsel, filed a Response, the undersigned Hearing Officer entered an Order dated November 19, 1981 which denied the Motion. That Order nonetheless found that there were certain matters upon which there was no genuine issue of material fact, which were specified in Finding 15 therein.

On November 23, 1981, a Final Pre-Hearing Conference was held and the parties, each by counsel, filed Stipulations of Fact. At that Conference, it was agreed that as a result of Finding 15 in the November 19 Order and the parties' Stipulations of Fact, the only question remaining affecting the issue of liability was whether Kennecott's changed interpretation of its rule regarding probationary absenteeism and tardiness was the reason for the difference between its treatment of Ballard's probationary employment and its treatment of the probationary employment of Brad Wines and Vince Morrow.

That issue was considered at a hearing held before the undersigned Haring Officer on Friday, December 11, 1981. Ballard was present and represented by counsel, Ms. Janet M. Coney. Kennecott was represented by counsel, Mr. Michael R. Main and Ms. Roberta Sabin Recker of the Indianapolis law firm of Baker & Daniels. Also present for Kennecott was its Director of Industrial Relations, Mr. Chester Dawson.

Evidence was presented out of usual order by agreement of the parties. After hearing testimony of one witness called by Kennecott and one witness called by Ballard and considering the documents admitted into evidence, the Hearing Officer announced that he found in favor of Kennecott on the issue remaining and that he would incorporate Findings of Fact and Conclusions of Law into a recommended decision.

Being duly advised in the premises, the Hearing Officer now recommends that ICRC enter the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. Complainant Donna Jo Anne Ballard ("Ballard") is a female. (Order of November 219, 1981, Finding 15(a). Hereinafter cited as "Order, 15__.").
2. Respondent Kennecott Corporation ("Kennecott") is a corporation which operates a manufacturing facility in Lebanon, Indiana known as the Commercial Filters Division which manufactures industrial oil filters. (At the time that the complaint arose, this facility was operated by Carborundum Company. At the Initial Pre-Hearing Conference, the parties, by counsel, agreed that Kennecott was the responsible party and should be substituted as Respondent herein. See First Pre-Hearing Statement, June 5, 1981, Paragraph 3. "Kennecott" as used herein, refers to whatever legal entity was operating at the time to which reference is made.).
3. Ballard was hired by Kennecott as a machine operator and commenced employment there on May 14, 1979. [Order, 15b; Stipulations November 23, Paragraph 1] (hereinafter cited as Stip.).
4. On May 18, 1979, Ballard was absent from work. (Stip. 2.).
5. On May 22, 1979, Ballard was late for work. (Stip. 3).

6. On May 29, 1979, Ballard was absent from work for one-half day (Stip. 4).

7. On June 25, 1979, Ballard was late for work. (Stip. 5.).

8. Ballard was terminated on June 26, 1979, for poor attendance after she had accumulated four (4) incidents of absenteeism and tardiness. (Order 15f; Stip. 6,7).

9. The position in which Ballard was employed was one on the bargaining unit (Order, 15c.).

10. The provisions of the collective bargaining agreement between Kennecott and United Steelworkers of America, Local No. 7651 ("Union contract") relevant to discharge are, in material part, set out below:

> New employees will serve a probationary period of forty (40) scheduled working days during which time the Employer will be free to …discharge the employee at the Employer's discretion….Union Contract, Art. X, Section 6.
>
> The Management of the business of the Employer and the direction of its personnel, including the right to…discharge and discipline for just cause are the exclusive responsibility at the employer….Union Contract, Art. III, Section 1. (Order, 15.d.).

11. Kennecott's Plant Rules included the following:

> ATTENDANCE – It is important in our type of operation that all employees be at work on every scheduled work day. Therefore, excessive absenteeism or tardiness (whether excused or unexcused cannot be condoned…. (Order, 15e).

12. Ballard's contention that Kennecott committed unlawful discrimination based on sex when it discharged her is based on her claim that male probationary employees were treated more favorable than she. In support of this claim, Ballard had identified five (5) male employees who she has claimed, at one point or another in these proceedings, had worse attendance records during their probationary period than she did, and yet were not discharged.

Those employees are Daniel W. Snow ("Snow"), Mike Culley ("Culley"), Paul Shelton ("Shelton"), Brad Wines ("Wines"), and Vince Morrow ("Morrow").

13. During 1979, one (1) other probationary employee was terminated during the probationary period for attendance problems. That employee was Snow, who was hired by Kennecott on January 22, 1979. Snow was terminated on Mary 9, 1979. Like Ballard, Show had accumulated four (4) incidents of absence or tardiness when he was discharged (Order, 15g; Stip. 8.).

14. Snow and Ballard are the only probationary employees hired by Kennecott in 1979 who had more than three incidents of absence or tardiness during the probationary period. Both Snow and Ballard were terminated. (Stip. 9.).

15. Culley was hired by Kennecott as a probationary employee on May 16, 1979. His probationary period of employment ended on July 5, 1979. During the period of his probationary employment, Culley had a total of two instances of absence or tardiness: he was absent twice and had no instances of tardiness. (Stip. 10).

16. Shelton was hired at Kennecott and commenced employment on January 26, 1976. He was laid off or terminated for lack of work on March 4, 1976 and rehired on March 17, 1976. He had incidents of absenteeism or tardiness on the following days through Mid-May of 1976: March 1, March 19, March 22, April 1, and April 26. It was agreed by Kennecott prior to his rehire that the planned absence on March 19 would not count against his attendance record. (Order, 15j).

17. Whether Shelton's probationary period is considered as starting anew on March 17 or included the period prior to the lay-off or termination, he did not accumulate four (4) chargeable incidents during his probationary period, as did Ballard. (Order 15k).

18. In March of 1976, Kennecott promulgated a new "rule of thumb" concerning the number of incidents of absenteeism and tardiness considered excessive for a probationary employee. This rule of thumb, which was the first standard promulgated since the plant rules were published in 1971, was that incidents in excess of two were considered excessive. (Order, 15h).

19. Two (2) male employees of Kennecott have had attendance records as bas as or worse than Ballard's during their probationary periods but were not discharged therefore. Those employees, Wines and Morrow, completed their probationary periods prior to the promulgation of the "rule of thumb". (Order, 151).

20. The reason Wines and Morrow were not discharged during their probationary periods while Ballard was discharged during her probationary period was not sex, but was the institution of Kennecott's rule of thumb concerning what constituted excessive absenteeism and tardiness during the probationary period. That this is so is supported by each of the following:

a. There is no evidence of any male employee who completed his probationary period after the institution of the rule of thumb who was retained by Kennecott who had an attendance record as bad as or worse than Ballard's.

b. There is no evidence of any female employee who was discharged prior to the completion of her probationary period prior to the institution of the rule of thumb who had an attendance record better than either Wines' or Morrow's.

c. The only probationary employee other than Ballard who during 1979 accumulated four (4) or more incidents of absence or tardiness was Snow who, like Ballard, accumulated four (4) and who, also like Ballard, was discharged as a result.

21. There is no evidence that sex was a factor in the decision of Kennecott to discharge Ballard.

22. Any Conclusion of Law which should have been deemed to be a Finding of Fact is hereby adopted as such.

CONCLUSIONS OF LAW

1. The Indiana Civil Rights Commission ("ICRC") has jurisdiction over the subject matter and the parties.

2. The Indiana Civil Rights defines "discriminatory practice," in material part, as follows:

> The term "discriminatory practice" means the exclusion of a person, from equal opportunities because of…sex…Every discriminatory practice relating to …employment…shall be considered unlawful unless it is specifically exempted by this chapter. IC 22-9-1-3(1).

3. In a case alleging "disparate treatment" by an employer, a finding of some degree of discriminatory motive on the employer's part accompanying the act complained of is necessary in order to find a "discriminatory practice". *Indiana Bell Telephone, Incorporated v. Boyd* ____Ind. App.____, 421 N.E. 2d 660 (1981).

4. Though proof of discriminatory motive in such cases can in some situations be inferred from the mere fact of differences in treatment, *International Brotherhood of Teamsters v. United States* 432 U.S. 324 (1977) (n. 15 at 431 U.S. 335), quoted with approval in *Indiana Bell, supra.*, this is not such a situation because the only males treated more favorably than Ballard were treated that way because of the fact that, unlike Ballard, their probationary periods expired before the institution f the rule of thumb concerning what constituted excessive absenteeism and tardiness for a probationary employee.

5. Kennecott did not commit an unlawful discriminatory practice when it discharged Ballard.

6. If ICRC finds that a person has not engaged in an unlawful discriminatory practice or violation of the Indiana Civil Rights Law, it must dismiss the complaint as to such person. IC 232-9-1-6(k) (3).

7. Kennecott is a corporation and is, therefore, a "person" IC 22-9-1-4(a).

8. Any Finding of Fact which should have been deemed to be a Conclusion of Law is hereby adopted as such.

ORDER

1. Ballard's complaint should be, and the same hereby is, dismissed.

Dated: January 5, 1982